91-131

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

1991 Term

ROBERT PADGET, WILLIAM CAIN, JR.,
KEITH MCGEE, TERRY NORRIS,
ROBERT SOLOMON, MIKE WINEMILLER
LARRY SNELLENBERGER

Petitioners

v.

GRAPHIC COMMUNICATIONS INTERNATIONAL UNION AND
GRAPHIC COMMUNICATIONS UNION LOCAL 303

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Is an action by employees (former union members) solely against the union and based upon the union's failure to provide proper notice of a strike to the employer thereby causing all employees/union members to lose their jobs governed by the most closely analogous state statute of limitations for legal malpractice actions rather than the six-month limitations period for unfair labor practices as applied by the Court of Appeals for the Seventh Circuit.

PARTIES TO THE ORIGINAL PROCEEDINGS

A. Original Plaintiffs (Appellees in Seventh Circuit):

Larry Johnson, Robert Padget, David C. Ray, John T. Payne, John Coy, Earl Thompson, William Cain, Jr., Wayne Deal, David Hopkins, Keith McGee, Terry Norris, Pete Sellers, Robert Solomon, Larry Snellenberger, Charles Taylor, Mike Winemiller and Ron Allison.*

B. Original Defendants (Appellants in Seventh Circuit): Graphic Communications International Union and Graphic Communications Union Local 303.

C. References:

Hereinafter, the Petitioners shall be referred to as "Employees" and the Respondents shall be referred to as "Union".

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*For various reasons, only Robert Padget, William Cain, Jr., Keith McGee, Terry Norris, Robert Solomon, Larry Snellenberger, and Mike Winemiller have chosen to proceed with this action and are Petitioners herein. Clerk of the United States Supreme Court has been notified pursuant to Supreme Court Rule 12.4.

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OPINIONS BY OTHER COURTS

Johnson, et al., v. Graphic Communications International Union and Graphic Communications Union Local 303, ____ F.2d ____ (Seventh Circuit, April 19, 1991) (A-1 to A-10)

Johnson, et al., v. Graphic Communications International Union and Graphic Communications Union Local 303, unreported, (U.S. District Court, Southern District, Indiana, April 4, 1989) (A-11 to A-19)

JURISDICTIONAL STATEMENT

Employees seek the review of the decision of the United States Court of Appeals for the Seventh Circuit dated April 19, 1991 whereby it reversed the decision of the District Court and remanded with instructions to dismiss Employees' complaint as untimely.

Employees had brought their action against Union for Union's errors and omissions and charged a knowing breach of the duty of representation as it may relate to the Labor Management Relations Act, as amended, 29 U.S.C. Sec. 185. The district court exercised jurisdiction in this matter under 29 U.S.C., Sec. 1137 by virtue of a federal question arising under 29 U.S.C. Section 185. Respondents Union are both unincorporated associations and are "labor organizations" as that term is defined in Section 2(5) of the National Labor Relations Act, 29 U.S.C., Sec. 152(5).

Upon the District Court's denial of their Motion to Dismiss, Union sought certification for an interlocutory appeal pursuant to 28 U.S.C. Sec. 1292(b) suggesting there to be "a controlling question of law as to which there is substantial ground for difference of opinion." Certification was granted and ultimately the decision of April 19, 1991, which is the basis of this petition, was rendered.

APPLICABLE STATUTORY PROVISIONS

A. Section 8(d) of the National Labor Relations Act

(29 U.S.C. Sec. 158(d))

Section 158 Unfair Labor Practices

> (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any

question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification —

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2)-(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the

employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any nodification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158 to 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

B. Section 301 of the Labor-Management Relations Act of 1947 (29 U.S.C. Sec. 185)

Sec. 185 Suits by and against labor organizations

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor orgainzations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the

United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

C. Section 10(b) of the National Labor Relation Act (29 U.S.C. Sec. 160(b))

Section 160 Prevention of unfair labor practices — Powers of Board generally

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the date of his discharge. Any such complaint

may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States, adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28.

D. Indiana Statute of Limitations in Actions Concerning Professional Services

I.C. 34-4-19-1 Two year limitation

Sec. 1. No action of any kind for damages, whether brought in contract or tort, based upon professional services rendered or which should have been rendered, shall be brought, commenced or maintained, in any of the courts of this state against physicians, dentists, surgeons, hospital, sanitariums, or others, unless said action is filed within two (2) years from the date of the act, omission or neglect complained of.

E. Indiana General Limitations

I.C. 34-1-2-2(1)

Sec. 2. The following actions shall be commenced within the periods herein prescribed after the cause of action has accrued, and not afterwards:

(1) For injuries to person or character, for injuries to personal property, and for a forfeiture of penalty given by statute, within two (2) years.

STATEMENT OF THE CASE

Employees are former employees of Moore Langen Printing Company (hereafter "Moore Langen") and former members of defendants Union and Local. Employees brought this action alleging that Union failed to satisfy statutory and regulatory requirements for a work stoppage and that Union fraudulently represented that these requirements had been met. Employees allege that in reliance upon these representations they conducted a work stoppage on April 16, 1984. Employees state that the requirements for a strike were not actually met and as a result of the unprotected strike, Employees were terminated by their employer, Moore Langen. Employees seek damages from Union, asserting that Union held themselves out to be experts in representation and collective bargaining and that Union's misrepresentations as to the satisfaction of requirements for a legal strike are the proximate cause of Employees' termination from their employment.

Employees allege that the act of the Union which gave rise to their cause of action occurred on April 15, 1984. Employees filed their Complaint with the clerk of the district court on April 15, 1986, approximately two years after the date set forth in their Amended Complaint when Union was alleged to have committed the actions complained of therein.

Employees action is *not* a "hybrid" action as the one dealt with in the *DelCostello* decision. Their action is against the Union only and there is no cause of action lying against the Employer.

Union filed their respective motions to dismiss contending that the Employees' action was time-barred by their failure to comply with the six month statute of limitations imposed on duty of fair representation cases pursuant to Section 10(b) of the National Labor Relations Act, 29 U.S.C. Sec. 160(b). The district court, by Order dated April 4, 1989, denied Union's motions to dismiss based on its holding that the two year Indiana legal malpractice limitations period, rather than the Section 10(b) period, applied to Employees' claim.

Union said that the district court's April 4, 1989, Order falls within the criteria for an immediate appeal under 28 U.S.C. Sec. 1292(b). Employees maintain their position that the tests and rationale offered by the United States Supreme Court in its *DelCostello* decision provides sufficient basis for the district court ruling and that immediate appeal was not appropriate.

On May 1, 1989, Union filed their Joint Motion for Certification for an Interlocutory Appeal, pursuant to 28 U.S.C. Sec. 1292(b).

By Order dated September 13, 1989, the United States Court of Appeals for the Seventh Circuit granted the Joint Petition of Defendants Graphic Communications International Union and Graphic Communications Union Local 303 for permission for an interlocutory appeal pursuant to 28 U.S.C. Sec. 1292(b). Pursuant to the Court's September 13, 1989 Order, the scope of the interlocutory appeal was limited to a review of the district court's April 4, 1989 Order denying Appellants' motions to dismiss Employees action as time-barred pursuant to Section 10(b) of the National Labor Relations Act, 29 U.S.C. Sec. 160(b).

Employees claim that the Union failed to satisfy statutory requirements for a work stoppage and that Union fraudulently represented that these requirements had been met, and as a consequence of their malfeasance, misfeasance, and nonfeasance the strike in which Employees engaged was declared unprotected and the Employees' employment at Moore Langen Printing Company was terminated based on their participation in an unprotected strike.

On April 4, 1989, the United States District Court for the Southern District of Indiana, Terre Haute Division, issued an Order denying the Motions of Defendants Graphic Communications International Union and Graphic Communications Union Local 303 to dismiss this action as time barred. In doing so, the district court rejected the Union's arguments that the applicable statute of limitations was Section 10(b) of the

National Labor Relations Act and held that the appropriate limitations period was the two year Indiana malpractice limitations period, I.C. 34-1-2-2(1).

The Court of Appeals for the Seventh Circuit reversed the District Court's decision and remanded the case for dismissal. Employees maintain their contention that the two year Indiana malpractice statute of limitations applies and asks this Court to review the April 19, 1991 decision for the reason that it is not consistent with the holdings of this Court in *DelCostello* and *Hoosier Cardinal*.

ARGUMENT

On June 8, 1983, the United States Supreme Court issued its decision in the case of *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 103 S.Ct. 2281 (1983) and ventured ever so slightly from the standard practice of applying analagous state statutes of limitations ("borrowing") to actions based upon federal law for which a federal limitations period had not been specifically designed.

The initial holding in *DelCostello* is an follows:

> As is often the case in federal civil law, there is no federal statutes of limitations expressly applicable to this suit. In such situations we do not ordinarily assume that Congress intended that there be no time limit on actions at all; rather, our task is to "borrow" the most suitable statute or other rule of timeliness from some other source. We have generally concluded that Congress intended that the Courts apply the most closely analogous statute of limitations under state law. "The implied absorption of State statutes of limitation within the interstices of the federal enactments is a phase of fashioning remedial details where Congress has not spoken but left matters for judicial determination within the general framework of familiar legal principles." *Holmberg v. Armbrecht*, 327 U.S. 392, 395, 66 S.Ct. 582, 584, 90 L.Ed. 743 (1946).

DelCostello, 462 U.S. 151, 103 S.Ct. 2281, 2287. However,

DelCostello presented such a unique set of circumstances that the six-month statute of limitations for unfair labor practices was chosen to be applicable in order to protect "those consensual processes that federal labor law is chiefly designed to promote — the formation of the collective agreement and the private settlement of disputes under it." *DelCostello* at page 2289 citing *Auto Workers* vs. *Hoosier Corp.*, 383 U.S. 696, 86 S.Ct. 1107, 16 L.Ed. 2d 192 (1966).

The United States Court of Appeals for the 7th Circuit ("Seventh Circuit") has chosen to expand *DelCostello*. Its April 19, 1991 decision of which Employees hereby seek review ignores the length to which Justice Brennan spoke in explaining why the Court had chosen to depart from the "borrowing" practice. Great effort was expended to show the need for using the six-months limitations period in the *DelCostello* situation. Equal effort was made to explain why "borrowing" was not appropriate as suggested in the dissenting opinions of Justice Stevens and Justice O'Connor. The Court emphasized that "borrowing" continues to be the rule, and not the exception:

> We stress that our holding today should not be taken as a departure from prior practice in borrowing limitations periods for federal causes of action, in labor law or elsewhere. We do not mean to suggest that federal courts should eschew use of state limitations periods anytime state law fails to provide a perfect analogy.

DelCostello, 103 S.Ct. 2281, at Page 2294.

Since the *DelCostello* decision, this Court has continued to emphasize the limited exception to the general rule of borrowing state statutes of limitations most closely analogous to the federal action. In *Reed v. United Transportation Union*, 109 S.Ct. 621 (1989), Justice Brennan in referring to *DelCostello* states, "We have recognized a closely circumscribed exception to the general rule that statutes of limitations are to be borrowed from state law." Referring to other cases, he further states, "This is a narrow exception to the general rule. As we made clear in *DelCostello*, in labor law or elsewhere, applica-

tion of a federal statute will be unusual and 'resort to state law remains the norm for borrowing of limitations.'"

Employees have taken the position that the actions of the Union in failing to take the necessary steps to protect their job action amounts to "malpractice" and is analogous to a legal malpractice action in the State of Indiana which may be filed within two (2) years. I.C. 34-4-19-1 and I.C. 34-1-2-2(1). See *Johnson v. Cornett*, 474 N.E.2d 518 (1985). The position in which the Employees found themselves fits clearly into the extensive discussion by Justice Brennan in *DelCostello* and is strongly supported by the dissenting justices.

If the "formation of the collective bargaining agreement and the private settlement of disputes under it" are foremost in the minds of those applying the six-month period, these factors must be present in the action. They are not.

The collective bargaining agreement had expired and, upon pursuing on unprotected work stoppage, so had the employer-employee relationship. The Employees were left with only a cause of action against the Union which was not based upon the collective bargaining agreement or the "private settlement of disputes under it." Their action is for Union "malpractice" and the statute of limitations for legal malpractice in Indiana was clearly and more closely analogous.

As expressed in its decision, the Seventh Circuit is not fond of the practice of borrowing state statutes of limitations when given the opportunity, and it has expanded the *DelCostello* rationale to include actions not contemplated by the holding in *DelCostello*. Employees contend that the Seventh Circuit has, in the words of Supreme Court Rule 10.1(a), "so far departed from the accepted and usual course of judicial proceeding . . . . as to call for an exercise of this Court's power of supervision."

As admitted by the Seventh Circuit, borrowing is the "norm" yet it stretched the circumstances of this case to accommodate the six-month limitation period without clearly establishiing a

sufficient federal labor law interest to not follow the stated "norm".

Employees also contend that Seventh Circuit decision has decided an important question of federal law in a way which conflicts with this Court's *DelCostello* decision. Supreme Court Rule 10.1(c).

The Seventh Circuit suggested that its "decision should not be read as a departure from the mandates of *Hoosier Cardinal* and *DelCostello*: state law should be resorted to in most cases." Yet, its decision only serves to widen the void allowed to exist by the legislative branch and its failure to establish a federal statute of limitations. Only after the Employees had allowed the significantly shorter six-month period to pass did they discover that their action was lost due to a broader reading of *DelCostello* than had been intended by its authors.

The Seventh Circuit decision violates the "norm" of borrowing and fails to follow the underlying rationale and thinking upon which *DelCostello* was decided.

Respectfully submitted,

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Appendix

In the
United States Court of Appeals
For the Seventh Circuit

No. 89-3085

LARRY JOHNSON, et al.,

Plaintiffs-Appellees,

v.

GRAPHIC COMMUNICATIONS INTERNATIONAL UNION AND GRAPHIC COMMUNICATIONS UNION LOCAL 303,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Indiana, Terre Haute Division.
No. TH-86-105-C—**Gene E. Brooks**, *Judge.*

ARGUED SEPTEMBER 24, 1990—DECIDED APRIL 19, 1991

Before BAUER, *Chief Judge*, COFFEY, and KANNE, *Circuit Judges.*

BAUER, *Chief Judge.* Larry Johnson and other former employees of the Moore Langen Printing Company of Terre Haute, Indiana ("Plaintiffs") think that their union gave them a raw deal. In November 1983, the collective bargaining agreement between Moore Langen and Graphic Communications Union Local 303 of the Graphic Communications International Union ("Defendants" or collectively, the "Union") expired, and negotiations for a new contract had begun. When the following April rolled around, the

parties still had not come to an accord, so the Union leadership decided to call a strike. Johnson and his coworkers joined in a work stoppage on April 16, 1984. Trouble was, the Union did not give Moore Langen proper notice of the strike as required by section 8(d) of the National Labor Relations Act. 29 U.S.C. § 158(d) (1947) ("NLRA"). Because the Union failed to take all legally required action to allow a work stoppage, the strike was unlawful and, therefore, the employees' conduct was unprotected. As a result of having participated in an illegal work action, Johnson and his coworkers were fired.

Nearly two years later, on April 15, 1986, Johnson and the other former employees of Moore Langen filed a complaint in federal district court pursuant to section 301 of the Labor-Management Act of 1947, 29 U.S.C. § 185, which provides federal jurisdiction for suits by employees against their union for unfair or discriminatory treatment. *See Vaca v. Sipes*, 386 U.S. 171 (1967); *Lewis v. Local Union No. 100 of Laborers' International Union*, 750 F.2d 1368 (7th Cir. 1984). The complaint portrayed Union officers and business agents as having "held themselves out to be experts in representation, collective bargaining and, particularly, the required legal procedures and prerequisites for work stoppages and strikes." The Plaintiffs alleged that Union officials' fraudulent misrepresentations that the Union had satisfied all legal prerequisites before engaging in strike activity induced the employees to join the work stoppage, causing the employees to lose their jobs and pension, insurance, and vacation benefits.

The local and international branches of the Union filed motions to dismiss on the grounds that the complaint was time-barred. The Union argued that because the conduct that gave rise to the cause of action occurred on April 15, 1984, the Plaintiffs had failed to comply with the six-month statute of limitations imposed on duty of fair representation cases pursuant to section 10(b) of the NLRA. 29 U.S.C. § 1292 (b). On April 4, 1989, the district court denied the Union's motions to dismiss on the grounds that

the two-year Indiana legal malpractice limitations period applied, rather than the six-month section 10(b) limitations period. On May 1, 1989, Defendants filed a Joint Petition for Certification for an Interlocutory Appeal pursuant to 28 U.S.C. § 1292(b), which allows for such appeals if there is "a controlling question of law as to which there is substantial ground for difference of opinion" and an immediate appeal "may materially advance the ultimate termination of the litigation. . . ." We granted the Petition in order to determine which statute of limitations applies. This question has arisen because section 301 of the Labor Management Relations Act does not contain an express time limitation.

When a federal statute is silent on the proper limitations period, federal courts determine the timeliness of a suit by reference to an appropriate statute of limitations, the best choice being the most closely analogous time limitation under state law. *Wilson v. Garcia*, 471 U.S. 261, 266-67 (1985). The selection process is accomplished by characterizing a federal cause of action on the basis of the particular facts and legal theories involved in the action and then picking a state limitations period that best approximates the characterization. This "mix and match" game is not very easy to play. "State legislatures do not devise their limitations periods with national interests in mind. . . ." *Occidental Life Insurance Co. of California v. EEOC*, 432 U.S. 355, 367 (1977). Judge Posner has lamented that "[b]orrowing a period of limitations from one statute to use with another that doesn't have its own limitations provision is a matter of which round peg to stuff in a square hole." *Short v. Belleville Shoe*, 908 F.2d 1385, 1393 (7th Cir. 1990) (Posner, J., concurring).

For example, despite the fact that the Supreme Court has acknowledged that the subject matter of section 301 is "peculiarly one that calls for uniform law," *Teamsters v. Lucas Flour*, 369 U.S. 95, 103 (1962) (citations omitted), the Court refused to apply a federal statute of limitations

to a section 301 suit for an employer's breach of a collective bargaining agreement and instead used Indiana's six-year limitations period for actions on unwritten contracts. *Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966). *Accord International Union of Elevator Constructors v. Home Elevator Co.*, 798 F.2d 222 (7th Cir. 1986) (state statute of limitations governing common law action for breach of contract provides a closer analogy than federal law for a union's section 301 action alleging that the employer violated the collective bargaining agreement by failing to pay employees contractual wage rate). In *Hoosier Cardinal*, the Court concluded that the Indiana limitations period was a better "match" because the case did not involve "those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective agreement and the private settlement of disputes under it." 383 U.S. at 702. Furthermore, the subject matter of *Hoosier Cardinal*—the termination of employees covered by a collective bargaining agreement without payment of accumulated vacation pay—was closely analogous to an ordinary breach of contract suit. In opting for the state statute of limitations, the Court was careful to note that it was not deciding the appropriate time limits for all cases brought under section 301. It declined to predict how it would rule when the analogy between the federal and state actions was not as obvious or close. *Id.* at 705 n.7.

The picture changed significantly after *DelCostello v. Teamsters*, 462 U.S. 151 (1983), and *Agency Holding Corp. v. Malley-Duff & Assoc.*, 483 U.S. 143 (1987). In both cases, the Supreme Court decided that federal rather than state law supplies the missing period of limitations. *Agency Holding* departed from traditional "borrowing" by applying the four-year period of limitations in the antitrust laws to suits under RICO. While acknowledging that "the mere fact that state law fails to provide a perfect analogy to the federal cause of action is never itself sufficient to justify the use of a federal statute of limitations," 483 U.S. at 147, the Court conceded that the statute of limitations in the Clayton Act offered "a far closer analogy to RICO

than any state law alternative." *Id.* at 150. Moreover, a uniform statute of limitations was required to avoid "uncertainty and time-consuming litigation." *Id.* (quoting *Wilson v. Garcia*, 471 U.S. at 272).

DelCostello involved a section 301 action and thus, for our purposes, warrants a closer examination. The lawsuit in *DelCostello* was a "hybrid" section 301 action against both the employer for violation of the collective bargaining agreement and the union for breach of the duty of fair representation. The Court determined that a federal statute of limitations—the six-month limitations period of section 10(b) of the NLRA—was more closely analogous to the lawsuit than any of the suggested state law counterparts. Although emphasizing that borrowing state limitations remained the "norm" whenever state law provided a perfect analogy, the Court indicated that it would not hesitate to turn away from state law "when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking. . . ." 462 U.S. at 172. *See also Reed v. United Transportation Union*, 488 U.S. 319, 324 (1989). The suggested state limitation in *DelCostello* was too short to enable the aggrieved employees to vindicate their rights. Also, because *DelCostello* was a hybrid claim, the actions against the employer and the union were inextricably linked so that it would be impractical to establish different statutes of limitation for each half of the suit.

DelCostello resolved the question of which statute of limitations applies in hybrid section 301 actions. Left open, however, was the applicability of the six-month limitations period to "pure" section 301 actions; that is, straightforward suits against the employer alleging a breach of the collective bargaining agreement or straight unfair representation claims against unions. Even though *DelCostello* refused to overturn *Hoosier Cardinal*, a footnote in the decision implies that the limitations period in section 10(b) of the NLRA should be applied to pure section

301 claims: "[E]ven if this action were considered as arising solely under § 301 . . . the objections to use of state law and the availability of a well-suited limitations period in § 10(b) would call for application of the latter rule." 462 U.S. at 158-59 n.12. In *Erkins v. United Steelworkers*, 723 F.2d 837 (11th Cir.), *cert. denied*, 467 U.S. 1243 (1984), the Eleventh Circuit adopted the federal statute of limitations in a section 301 case involving a breach of the duty of fair representation. The court reasoned that because unfair representation claims also are unfair labor practices, the six-month period from section 10(b) applies.

This circuit has been "properly circumspect" about applying the federal statute of limitations to nonhybrid section 301 suits. *Niro v. Fern Int'l, Inc.*, 827 F.2d 173, 177 (7th Cir. 1987) (collecting cases for and against application of the six-month rule to pure section 301 suits brought by a union to compel an employer to arbitrate a grievance). First, we look to see if federal law provides a more closely analogous limitations period than any state statute. Second, we choose a federal limitations period if federal policies and the practicalities of litigation make that statute of limitations more appropriate. *Plumbers Pension Fund, Local 130 v. Domas Mechanical Contractors*, 778 F.2d 1266, 1268-70 (7th Cir. 1985).

A comparison of Plaintiffs' complaint to an unfair labor practice claim for breach of the duty of fair representation convinces us that the two are not just closely analogous, but identical. The duty of fair representation arises from the union's exclusive right to represent all bargaining unit members in their dealing with the employer. *Vaca*, 386 U.S. at 182. A union commits an unfair labor practice under section 8(b) of the NLRA when its conduct toward a member of the collective bargaining unit is "arbitrary, discriminatory, or in bad faith." *Id.* at 190. On May 29, 1984, the Plaintiffs filed an unfair labor practice charge with the National Labor Relations Board ("NLRB") alleging that the Union violated section 8(b)(1)(a) of the NLRA. The basis of the charge was that

> [o]ur local went on strike on April 16, 1984 after we were assured by union officials that all the proper procedures had been followed. Our strike ended on April 19, 1984 after it was determined to be "illegal" because the union failed to provide the company with proper notice. All the strikers were replaced and most are currently on lay-off status, although some have been replaced. The union was negligent in its conduct and failed to properly represent us.

Only after the NLRB dismissed the charge on July 20, 1984, did the Plaintiffs file their suit in federal court at the eleventh hour. They alleged that the Union failed to take "all legally required action to allow a work stoppage," and that as a consequence of this failure, the strike was unprotected and the Plaintiffs were terminated. The Plaintiffs alleged that the Union had "assumed the duty to perform all prerequisites to a work stoppage" and that as a result of the Union's failure to perform this duty, Plaintiffs lost their employment and suffered other damages. The Plaintiffs claimed further that the Unions "acted intentionally, arbitrarily, in bad faith, and with a heedless disregard to the consequences to Plaintiffs, and that their actions amounted to fraudulent conduct."

Although the failed unfair labor practice charge was dressed up for purposes of the federal suit, the conduct complained of was the same. In the language of *DelCostello*, "all breaches of a union's duty of fair representation *are* in fact unfair labor practices. . . . [And even if they are not], the family resemblance is undeniable, and indeed there is substantial overlap." 462 U.S. at 170 (emphasis in original). The timeliness of an unfair representation suit is governed by federal law, *Vaca*, 386 U.S. at 177, and we may adopt a federal statute of limitations when, as here, the claim is identical to one expressly governed by a federal statute and the only other available choice is a less analogous state statute of limitations governing a lawyer's negligence in allowing time to run out on a client's valid claim.

Policy considerations also militate in favor of applying the federal time limitation. Plaintiffs argue that the policies warranting application of the 10(b) limitations period in a hybrid case such as *DelCostello* are not present here. They contend that the interest in prompt resolution of labor disputes is nonexistent because the employment relationship ceased between the discharged strikers and Moore Langen and there was no need to be concerned with the formation of the agreement and the private settlement of disputes under it. We disagree. Contrary to Plaintiffs' assertions, federal policies and the practicalities of litigation make the six-month statute of limitations "a significantly more appropriate vehicle for interstitial lawmaking" than a two-year rule borrowed from state law. *DelCostello*, 462 U.S. at 172. *See also Eatz v. DME Unit of Local Union Number 3 of the International Brotherhood of Electrical Workers*, 794 F.2d 29, 33 (2d Cir. 1986) (holding that the six-month rule applies to an unfair representation claim standing alone). The elements Congress balanced when it fashioned the limitations period of section 10(b) are the same elements to be balanced in this case. The six-month limitations period in section 10(b) was adopted in order to "bar litigation over past events 'after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused.' " *Local Lodge No. 1424 v. National Labor Relations Board*, 362 U.S. 411, 419 (1960) (quoting H.R. Rep. No. 245, 80th Cong., 1st Sess., p. 40). *See also Hall v. Printing and Graphic Arts Union, Local 3*, 696 F.2d 494, 499 (7th Cir. 1982). The period also was selected "to forestall the accumulation of back pay claims." 1947 U.S. Code Cong. & Admin. News 1135, 1159.

Furthermore, the six-month rule avoids the uncertainty associated with courts searching for more or less analogous state statutes. When courts are forced to conduct such case-by-case searches, "[p]laintiffs may be denied their just remedy if they delay in filing their claims, having wrongly postulated that the courts would apply a longer statute. Defendants cannot calculate their contingent liabil-

ities, not knowing with confidence when their delicts lie in repose." *Wilson v. Garcia*, 471 U.S. at 275 n.34. It was the uncertainty factor that led the Court in *Agency Holding* to conclude that a uniform federal statute of limitations was needed for civil RICO claims. Citing the lower court opinion, the Court observed that even a "garden variety" business dispute could be characterized any number of ways, thus calling into play "a multiplicity of applicable limitations periods." 483 U.S. at 149. Similarly, a breach of the duty of fair representation might be analogized to numerous causes of action, including fraud, breach of contract, tortious interference, or, as in this case, legal malpractice. Although involving the same species of conduct, different claims may be subject to varying periods of limitations and tolling doctrines, resulting in "the essential condition for standardless, discretionary judgment." *Belleville Shoe*, 908 F.2d at 1394 (Posner, J., concurring).

The situation should improve slightly because of the Federal Courts Study Implementation Act of 1990, Pub. L. No. 101-650, title III, 104 Stat. 5089 (1990), which provides that civil actions arising under statutes enacted after December 1, 1990 (the date of enactment of the Act) "may not be commenced later than 4 years after the cause of action accrues." At the present, however, we are faced with great uncertainty and lack of uniformity. In *Belleville Shoe*, we expressed our displeasure with a scheme that has led to a good deal of wasteful litigation. Acting on our belief that using a crazy quilt of state statutes to supply missing periods of limitations in securities cases was inconsistent with the overall fabric of the securities statutes, we held that federal and not state law supplies the missing statute of limitations in suits arising under section 10(b) of the Securities Exchange Act of 1934 and Rule 10(b)(5). 908 F.2d at 1389. The same protest should be voiced when a less-than-analogous state statute is inconsistent with federal labor policy. The problematic application of state statutes of limitations "might have to be tolerated if state law were the only source reasonably available for borrowing. . . ." *DelCostello*, 462 U.S. at 169.

But when "we have available a federal statute of limitations actually designed to accommodate a balance of interests very similar to that at stake here. . . ," *id.*, the federal statute is more fitting than an approximation drawn from state law.

Our decision should not be read as a departure from the mandates of *Hoosier Cardinal* and *DelCostello*: state law should be resorted to in most cases. But when a section 301 suit provides a perfect parallel to an unfair labor practice, and when the same federal policies are at stake in both actions, the federal limitations period is significantly more appropriate. The decision of the district court, then, is REVERSED and REMANDED with instructions to dismiss the action as untimely. The six-month NLRA statute of limitations, rather than the two-year Indiana statute of limitations for legal malpractice, should apply.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

LARRY JOHNSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Cause No.
	)	TH 86-105-C
GRAPHIC COMMUNICATIONS INTERNATIONAL UNION and GRAPHIC COMMUNICATIONS INTERNATIONAL UNION LOCAL 303,	)	
	)	
Defendants.	)	

ORDER

This matter comes before the Court on motions to dismiss and memoranda in support filed by defendants Graphic Communications International Union (hereafter "Union") and Graphic Communications International Union, Local 303, (hereafter "Local) on May 5, 1986. Plaintiffs filed their brief in opposition to the motion on June 20, 1986. Defendants filed their respective reply briefs on July 3, 1986, and July 7, 1986. Defendant Union filed a supplemental memorandum in support on January 20, 1988.

Plaintiffs filed their amended complaint on January 21, 1988. Defendants Union and Local filed motions to dismiss the amended complaint on February 12, 1988, and February 2, 1988, respectively. Plaintiffs' response was filed March 28, 1988.

The Court, after considering the motions and memoranda filed in support of and in opposition to said motions, and being duly advised in the premises, now DENIES defendants' motions to dismiss.

IT IS SO ORDERED this 4th day of April, 1989.

/s/ Gene E. Brooks
Gene E. Brooks, Chief Judge
United States District Court
Southern District of Indiana

MEMORANDUM

Plaintiffs are former employees of Moore Langen Printing Company (hereafter "Moore Langen") and former members of defendants Union and Local. Plaintiffs bring this action alleging that defendants failed to satisfy statutory and regulatory requirements for a work stoppage and that defendants fraudulently represented that these requirements had been met. Plaintiffs allege that in reliance upon these representations they conducted a work stoppage on April 16, 1984. Plaintiffs state that the requirements for a strike were not actually met and as a result of the illegal strike, plaintiffs were terminated by their employer, Moore Langen. Plaintiffs seek damages from defendants Union and Local, asserting that defendants held themselves out to be experts in representation and collective bargaining and that defendants' misrepresentations as to the satisfaction of requirements for a legal strike are the proximate cause of plaintiffs' termination from their employment.

Defendants have asserted two grounds in their respective motions to dismiss. First, they argue that this action is barred by the six-month statute of limitations found in § 10(b) of the National Labor Relations Act (hereafter "NLRA"), 29 U.S.C. § 160(b). Second, in their motions to dismiss the original complaint, both Union and Local asserted that the failure to plead intentional conduct made the complaint inadequate to state a cause of action. Plaintiffs subsequently amended their complaint and pleaded intentional conduct therein. Only Local now continues to assert that a cause of action has not been stated, calling for specificity in pleading of facts in the complaint.

The Court has jurisdiction to hear this case pursuant to 28 U.S.C. § 1337.

STATEMENT OF FACTS

In a motion to dismiss, the well-pled factual allegations in the complaint are taken as true, with all reasonable inferences drawn in favor of the plaintiffs. *Wolfolk v. Rivera*, 729 F.2d 1114, 1116 (7th Cir. 1984).

Plaintiffs are present and former employees of Moore Langen in Terre Haute, Indiana. In November, 1983, the collective bargaining agreement between Moore Langen and Union and Local expired. Negotiations for a new agreement were commenced but had been unsuccessful when, in April, 1984, defendants notified plaintiffs that a work stoppage was necessary. Defendants advised plaintiffs that defendants had considered and taken all legally required action to allow a strike.

Plaintiffs did, indeed, conduct a strike on April 16, 1984, and when it was determined that proper notice of the stoppage had not been served, making the strike unprotected, their employment was terminated by Moore Langen.

Plaintiffs filed the instant action April 15, 1986.

DISCUSSION

For the purposes of the motions to dismiss filed in this matter, the central issue is the appropriate statute of limitations for filing the claim. This will be addressed first with brief attention given later to defendant Local's argument concerning the sufficiency of the complaint to state a claim of violation of the duty of fair representation.

I. APPROPRIATE STATUTE OF LIMITATIONS

Defendants assert that the six-month period contained in § 10(b) of the NLRA, 29 U.S.C. § 160(b), applies to bar this action. Defendants claim that the decision of the United States Supreme Court in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), and case law from the Seventh Circuit Court of Appeals support such a conclusion here.

Plaintiffs argue for a different reading of *DelCostello*, especially in light of Seventh Circuit case law interpreting its significance. Plaintiffs ask the Court to apply the Indiana legal malpractice limitations period, two years, I.C. 34-1-2-2(1), *see Shideler v. Dwyer*, 417 N.E.2d 281 (Ind. 1981), as most analogous to this action.

Since plaintiffs filed well beyond the six-month period, but within the two-year period, once the question of which period applies is resolved, the issue is simple. The question of which period actually applies is not as simple.

The first step must be to take a closer look at *DelCostello*. The lead and companion cases were both hybrid § 301/duty of fair representation suits brought by individual employees against their respective employers for violation of the collective bargaining agreement and against their respective unions for violation of the duty of fair representation. In the lead case, the District Court and Court of Appeals had applied to both claims (i.e., the claim against the employer and the claim against the union) the 90-day statute of limitations for bringing a state-law action to vacate an arbitration award. In the other case, the District Court reached the same conclusion, applying to both claims the state-law 90-day period for vacating an arbitration award. The Court of Appeals, however, applied the 90-day period only to the claim against the employer, applying the state-law three-year period for bringing a legal malpractice action to the claim against the union.

The Supreme Court applied the six-month limitations period found in § 10(b) of the NLRA, 29 U.S.C. §160(b), to both claims in both cases. Although § 10(b) expressly applies only to suits under § 8 of the NLRA, 29 U.S.C. § 158, the Court concluded that the balancing of interests involved in *DelCostello* was very similar to the balancing required in a suit under § 8. 462 U.S. at 169. The Court found that § 10(b) provided a closer analogy to the hybrid suit than did the state-law legal malpractice limitations period. *Id.*

Quoting its decision in *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 (1981), the Court explained that the interests to be balanced are "the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective-bargaining system." *DelCostello*, 462 U.S. at 171 (quoting *Mitchell*, 451 U.S. at 70 (Steward, J., concurring)).

Although admitting that the legal malpractice action was the closest state-law analogy for the claim against the union, 462 U.S. at 167, the majority nevertheless rejected the limitations period applicable to such a suit. The Court objected to its application on the following two grounds:

(1) An employee would retain the right to sue the union for a longer period than he would be able to sue his employer. 462 U.S. at 167-168. In *Vaca v. Sipes*, 386 U.S. 171 (1967), however, the Court held that the union's liability is limited to increases in the employee's damages which resulted from the union's refusal to process a grievance. 386 U.S. at 197-198; *see also Bowen v. USPS*, 459 U.S. 212 (1983). Thus if an employee were allowed to sue the union when he could no longer sue his employer, a large portion of his damages would be uncollectible. 462 U.S. at 168. The Court also noted that having only the union as a defendant in that type of action would foreclose use of equitable remedies such as an order to arbitrate. *DelCostello*, 462 U.S. at 168, n. 17.

(2) Application of the longer malpractice limitations period would frustrate rapid resolution of labor disputes. 462 U.S. at 168. The Court was concerned that the collective bargaining system could "become unworkable if a decision which has given 'meaning and content' to the terms of an agreement. . . could suddenly be called into question. . . years later." 462 U.S. at 169 (quoting *Mitchell*, 451 U.S. at 64).

With these factors in mind, the Supreme Court stated the test simply and directly:

> We stress that our holding today should not be taken as a departure from prior practice in borrowing limitations periods for federal causes of action, in labor law or elsewhere. We do not mean to suggest that federal courts should eschew use of state limitations periods anytime state law fails to provide a perfect analogy. See, *e.g.*, *Mitchell*, 451 U.S., at 61, n. 3. On the contrary, as the courts have often discovered, there is not always an obvious state-law choice for application to a given federal cause of action; yet resort to state law remains the norm for borrowing of limitations periods. Nevertheless, *when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking*, we have not hesitated to turn away from state law.

DelCostello, 462 U.S. at 171-172 (emphasis added).

The Seventh Circuit Court of Appeals has embodied these issues and considerations in several cases, often restating the above-quoted test. *See, e.g., Niro v. Fearn International, Inc.*, 827 F.2d 173, 177 (7th Cir. 1987); *International Union of Elevator Constructors v. Home Elevator Company*, 798 F.2d 222, 226 (7th Cir. 1986) (state two-year statute of limitations more analogous to union's § 301 suit against employer for contract violation); *Plumbers' Pension Fund v. Domas Mechanical Contractors, Inc.*, 778 F.2d 1266, 1268-1269 (7th Cir. 1985) (state 90-day statute of limitations more analogous to employer's challenge to arbitration award). *Fearn* warns lawyers and lower courts not to apply the six-month limitations period blindly. 827 F.2d at 177. ("This circuit has been properly circumspect, however, about extending the six-month limitations period to causes of action other than the hybrid section 301 suit, where the analogy may be unwarranted by *DelCostello* or inconsistent with [*United Auto Workers* v.] *Hoosier Cardinal* [*Corp.*, 383 U.S. 696 (1966)] or *Mitchell*. (citations omitted.).")

In *Hoosier Cardinal*, to which the Court referred in the above quote, the Supreme Court ruled that the Indiana six-year statute of limitations was the most appropriate period and was not inconsistent with federal labor policy. As the Seventh Circuit noted in *Home Elevator*, *DelCostello* did not abrogate *Hoosier Cardinal*, 798 F.2d at 226; if the factors addressed in *DelCostello* are not present in a given case, then the *Hoosier Cardinal* decision must still be our guide and "we are bound. . . to apply the most analogous state statute of limitations." *Home Elevator*, 798 F.2d at 227.

Proceeding apace then, it is clear that, as the Court in *DelCostello* observed, a legal malpractice action is the closest state-law analogy to this action by the employees against their exclusive representative. 462 U.S. at 167. The next step is to look for a closer analogy provided by federal law. 462 U.S. at 169.

Defendants Union and Local direct our attention to § 10(b). This section, however, addresses suits revolving around practices which broadly implicate collective bargaining and negotiation procedures. *Mitchell*, 451 U.S. at 70-71 (Steward, J., concurring). The case at hand involves allegations by plaintiffs that their exclusive representatives, defendants, made affirmative misstatements on which defendants intended plaintiffs to rely and on which plaintiffs did in fact rely to their detriment — this action resembles a legal malpractice action more than it does a collective bargaining dispute.

The other consideration *DelCostello* and *Home Elevator* demand is that we look at the "big picture" of federal labor policy. 462 U.S. at 168-169; 498 F.2d at 228. One of the major considerations, if not the most important one in collective bargaining contexts, is the rapid resolution of labor disputes. If decisions affecting the collective bargaining agreement, and therefore of course the relationship between the union and the employer, came years after a given employment decision, the system would come to a screeching halt.

In the present case, however, plaintiffs do not seek to undo

the past employment decision — they do not even seem to question the propriety of their termination given the true status of the strike. Plaintiffs here seek to hold accountable their representatives for allegedly inducing them to participate in what was an illegal strike. If the Court were ultimately to find for plaintiffs and award damages against Union and Local, the judgment would affect neither the collective bargaining agreement between defendants and Moore Langen nor the continuing relationship they enjoy.

Since the state-law legal malpractice action is the most closely analogous to the instant action, and since there is no significant implication for federal labor policy in this cause, the appropriate statute of limitations is two years, as provided by I.C. 34-1-2-2(1). This action was therefore timely filed and defendants' motions to dismiss on this basis are DENIED.

II. SUFFICIENCY OF THE PLEADINGS

Defendants asserted as an additional basis for their motions to dismiss plaintiffs' failure to allege intentional conduct. Plaintiffs' subsequent amendment of the complaint to include such an allegation was sufficient when taken together with their factual allegations of defendants' inducement to strike, representations as to satisfaction of legal requirements of a work stoppage, plaintiffs' reliance on those representations, and the time, place, manner and maker of those representations. *See, e.g., D & G Enterprises v. Continental Illinois National Bank*, 574 F.Supp. 263, 267 (N.D. Ill. 1983); *see also Great American Trading Corp. v. ABC Food Ingredients, Inc.*, No. 79-123-C (S.D. Ind. March 26, 1982).

Defendant Local asserts that the pleadings are still deficient for the purposes of Fed.R.Civ.P. 9(b), which calls for particularity in pleading fraud or mistake. Defendant Local argues the Court that plaintiffs must "plead *facts*" which establish knowledge; Rule 9(b), however, states clearly that "knowledge . . . may be averred generally."

Without reaching the question of whether plaintiffs do indeed have to prove intentional conduct by defendants, *see, e.g., Swatts v. United Steelworkers of America*, 808 F.2d 1221 (7th Cir. 1986) (indicating that affirmative misstatement may be sufficient), the Court finds that plaintiffs' allegations as to defendants' agents' misrepresentations are sufficient under Fed.R.Civ.P. 9(b) and 12(b)(6) and that defendant Local's motion to dismiss on this basis is DENIED.

CONCLUSION

The Court finds that the appropriate statute of limitations for this action is two years and that this cause was therefore timely filed. Additionally, the Court finds plaintiffs' amended complaint states a claim for which relief can be granted.

Defendants' motions to dismiss are therefore DENIED. Defendants' motions for fees under Fed.R.Civ.P. 11 are necessarily without merit and are also DENIED.

IT IS SO ORDERED this 4th day of April, 1989.

/s/ Gene E. Brooks

Gene E. Brooks, Chief Judge
United States District Court
Southern District of Indiana

cc: Distribution to all counsel of record

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF INDIANA

LARRY JOHNSON, ROBERT PADGET, DAVID C. RAY, JOHN T. PAYNE, JOHN COY, EARL THOMPSON, WILLIAM CAIN, JR., MARK CUFFLE, CLYDE DARDEEN, JR., WAYNE DEAL, DAVID HOPKINS, KEITH McGEE, TERRY NORRIS, SAM SEATON, PETE SELLERS, ROBERT SOLOMON, LARRY SNELLENBERGER, CHARLES TAYPOR, MIKE WINEMILLER, and RON ALLISON,	)	
Plaintiffs,	)	
v.	)	CAUSE NO. TH86-105-C
GRAPHIC COMMUNICATIONS INTERNATIONAL UNION, and GRAPHIC COMMUNICATIONS INTERNATIONAL UNION — LOCAL 303,	)	
Defendants.	)	

AMENDED COMPLAINT

Come now the named Plaintiffs, by and through David D. Haynes of the law firm of Brames, Bopp, Haynes & Abel, their attorneys, and for their cause of action and claim for relief, allege and say:

1. That Plaintiffs are former and present employees of Moore Langen Printing, 200 Hulman Street, Terre Haute,

Vigo County, Indiana, and that each of them were employed by Moore Langen Printing on or about April 15, 1984.

2. That Plaintiffs are former members of Defendants, Graphic Communications International Union, and Graphic Communications International Union — Local #303, and each of them were members of Defendants on the 15th day of April, 1984. That Graphic Communications International Union is a labor union organized and existing under the National Labor Relations Act, with its principal place of business in Washington, D.C. and Defendant Graphic Communications International Union — Local #303 has its principal place of business located in Indianapolis, Indiana. That this action arises under U.S.C., Title 29, § 159(a), as hereinafter more fully appears.

3. That Defendants, by and through Graphic Communications International Union President, Kenneth Brown, its Vice-President, Leonard "Len" Dorson, and their representatives and agents, Richard Sneddon and Kaywood "Woody" Van Note, held themselves out to be experts in representation, collective bargaining and, particularly, the required legal procedures and prerequistes for work stoppages and strikes.

4. That in November, 1983, the collective bargaining agreement and contract by and between Moore Langen Printing and Defendants expired and negotiations for a new agreement were commenced.

5. That by April, 1984, a new agreement had not been reached and Defendants, by and through their representatives began to encourage, instigate, entice, and urge Plaintiffs to strike.

6. That on April 15, 1984, Plaintiffs met to consider a work stoppage and Defendants, by and through Kaywood "Woody" Van Note and Leonard "Len" Dorson convinced Plaintiffs to strike and advised them that Defendants had considered and taken all legally required action to allow a work stoppage.

7. That in reliance upon the alleged expertise of Defen-

dants and its misrepresentations regarding the satisfaction of all legal prerequisites, Plaintiffs conducted a work stoppage on or about April 16, 1984.

8. That Plaintiffs were thereafter advised that they had participated in an "illegal strike" due to Defendants' failure to properly notify all interested entities of the intended work stoppage as required by statute and regulation and Plaintiffs' employment at Moore Langen Printing was terminated.

9. That Defendants had assumed the duty to perform all prerequisites to a work stoppage and as a result of their failure to perform said duty and Plaintiffs' reliance on the fraudulent misrepresentations of Defendants, Plaintiffs have lost their employment at Moore Langen Printing and/or their accrued benefits including, but not limited to, pension, insurance, vacation, seniority, savings plans and other retirement benefits. That Defendants acted intentionally, arbitrarily, in bad faith, and with a heedless disregard for the consequences to Plaintiffs, and that their actions amounted to fraudulent conduct.

10. That the losses incurred by Plaintiffs are a direct result of assumed the misrepresentation of Defendants and the breach of their duty after having actively encouraged and urged Plaintiffs to strike and said misfeasance, malfeasance and nonfeasance of Defendants are the proximate cause of the damages and loss to Plaintiffs.

11. That Plaintiffs are entitled to a judgment against Defendants in an amount necessary to compensate each Plaintiff for his losses.

WHEREFORE, Plaintiffs pray this Court granted judgment against Defendants in an amount necessary to properly compensate Plaintiffs, and for all other proper relief in the premises.

BRAMES, BOPP, HAYNES
& ABEL

By: /s/ David D. Haynes
David D. Haynes, Attorneys for
Plaintiffs

Date: June 30, 1986

DEMAND FOR JURY TRIAL OF ALL ISSUES

Comes now Plaintiffs, by counsel, and pursuant to F.R.C.P. 38(b), demand that this cause be tried before a jury on all issues presented herein.

By: /s/ David D. Haynes
David D. Haynes, Attorneys for
Plaintiffs

Date: June 30, 1986

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of June, 1986, service of a copy of the above and foregoing pleading was made upon each party or attorney of record herein by placing a copy in the United States Mail, postpaid and addressed the last known address of said party or attorney of record.

/s/ David D. Haynes

David D. Haynes

Supreme Court, U.S.
FILED
AUG 29 1991
OFFICE OF THE CLERK

No. 91-131

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ROBERT PADGET, WILLIAM CAIN, JR., KEITH MCGEE, TERRY NORRIS, ROBERT SOLOMON, MIKE WINEMILLER, LARRY SNELLENBERGER,

Petitioners,

v.

GRAPHIC COMMUNICATIONS INTERNATIONAL UNION and GRAPHIC COMMUNICATIONS UNION LOCAL 303,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF GRAPHIC COMMUNICATIONS INTERNATIONAL UNION AND GRAPHIC COMMUNICATIONS UNION LOCAL 303 IN OPPOSITION

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the court of appeals correctly held that the six month limitations period contained in Section 10(b) of the National Labor Relations Act, 29 U.S.C. Section 160(b), rather than the two year Indiana legal malpractice limitations period, I.C. 34-1-2-2(1), applied to an action in which Plaintiffs-Petitioners allege that Defendant-Respondent Unions violated the duty of fair representation by failing to perform all prerequisites to a work stoppage, thus allegedly resulting in Plaintiffs' loss of employment.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-131

ROBERT PADGET, WILLIAM CAIN, JR.,
KEITH MCGEE, TERRY NORRIS,
ROBERT SOLOMON, MIKE WINEMILLER,
LARRY SNELLENBERGER,
Petitioners,

v.

GRAPHIC COMMUNICATIONS INTERNATIONAL UNION and
GRAPHIC COMMUNICATIONS UNION LOCAL 303,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF GRAPHIC COMMUNICATIONS INTERNATIONAL UNION AND GRAPHIC COMMUNICATIONS UNION LOCAL 303 IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported *sub nom. Johnson, et al., v. Graphic Communications International Union and Graphic Communications Union Local 303* at 930 F.2d 1178 (7th Cir. 1991). Pet. App. A1-A10. The district court's opinion is unreported. Pet. App. A11-A19.

STATEMENT OF THE CASE

Petitioners Robert Padget, William Cain, Jr., Keith McGee, Terry Norris, Robert Solomon, Mike Winemiller and Larry Snellenberger (hereinafter "Petitioners" or

"Plaintiffs") are present and former employees of Moore-Langen Printing Company of Terre Haute, Indiana. Pet. App. A20-A21, Par. 1. In November of 1983, the collective bargaining agreement between Plaintiffs' employer, Moore-Langen Printing Company, and Respondent-Defendant Local 303 had expired, and when negotiations for a new collective bargaining agreement failed to produce a new agreement, the Union called its members out on strike in April 1984. Pet. App. A21, Pars. 4 and 5. Plaintiffs' duty of fair representation claim is based on their factual allegation that Respondents-Defendants Graphic Communications International Union and its Local 303M (hereinafter jointly referred to as "the Union") convinced them to strike and advised them that all statutorily required notices had been given prior to the commencement of the strike. Pet. App. A21, Par. 6. Petitioners contend that in reliance upon the Union's representations, they commenced striking on April 16, 1984. Pet. App. A21, Par. 7. As a consequence of the Union's failure, the strike in which Plaintiffs engaged was declared unprotected and Plaintiffs' employment at Moore-Langen Printing Company was terminated, with recourse to the National Labor Relations Board precluded. Pet. App. A22, Pars. 8 and 9.

Plaintiffs' Complaint alleged that the act of the Union which gave rise to their cause of action occurred on April 15, 1984. Pet. App. A21, Par. 6. Plaintiffs did not file their Complaint with the district court until April 15, 1986 (Pet. App. A13), prompting the Union to move for dismissal of the action as time-barred by their failure to comply with the six (6) month statute of limitations imposed on duty of fair representation cases pursuant to Section 10(b) of the Labor-Management Relations Act, 29 U.S.C. Sec. 160(b), and this Court's decision in *DelCostello v. Teamsters*, 462 U.S. 151 (1983). The district court denied the Union's motion to dismiss, finding that Plaintiffs' claim was not a hybrid duty of fair representation/breach of contract claim such as that in *DelCostello*

and that its holding therefore did not apply to Plaintiffs' claim. The court then concluded that "[s]ince the state-law malpractice action is the most closely analogous to the instant action" (Pet. App. A18), the applicable limitations period was two years (Indiana Code 34-1-2-2(1)), making Plaintiffs' action timely.

The Union subsequently sought and obtained permission to bring an interlocutory appeal pursuant to 28 U.S.C. Sec. 1292(b). In an opinion issued April 19, 1991, the Court of Appeals for the Seventh Circuit reversed the district court and remanded the case with instructions to dismiss the action as untimely. In reaching this result, the court noted that in *DelCostello*, this Court had sanctioned departure from the "norm" of borrowing state limitations periods " 'when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate rule for interstitial law making . . . .' 462 U.S. at 172." Pet. App. A5. Finding that Plaintiffs' claim for breach of the duty of fair representation was "not just closely analogous, but identical" to an unfair labor practice claim for breach of the duty of fair representation (Pet. App. A6), the court of appeals concluded that "when 'we have available a federal statute of limitations actually designed to accommodate a balance of interests very similar to that at stake here . . . ,' [*DelCostello*, 462 U.S. at 169], the federal statute is more fitting than an approximation drawn from state law." Pet. App. A10.

REASONS THE WRIT SHOULD BE DENIED

1. In *DelCostello*, this Court held that the appropriate statute of limitations in hybrid Section 301/duty of fair representation cases is the six month period for unfair labor practice charges prescribed in Section 10(b) of the National Labor Relations Act, 29 U.S.C. Section 160(b).

This case presents the issue of whether the Supreme Court's holding in *DelCostello* is properly applied to an action in which the Plaintiffs allege that the Union violated the duty of fair representation by failing to perform all prerequisites to a work stoppage, thus allegedly resulting in Plaintiffs' loss of employment. The court of appeals' conclusion that a federal limitations period should be applied anticipated [1] this Court's recent decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 59 U.S.L.W. 4688 (U.S. June 20, 1991) (90-333),[2] *and is indisputably correct* under *Gilbertson's* holding that

> . . . where, as here, the claim asserted is one implied under a statute that also contains an express cause of action with its own time limitation, a court should look first to the statute of origin to ascertain the proper limitations period. We can imagine no clearer indication of how Congress would have balanced the policy considerations implicit in any limitations provision than the balance struck by the same Congress in limiting similar and related protections. See *DelCostello*, 462 U.S., at 171; *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 69-70 (1981) (opinion concurring in judgment). *When the statute of origin contains comparable express remedial provisions, the inquiry usually should be at an end.* Only where no analogous counterpart is available should a court then proceed to apply state-borrowing principles.

Gilbertson, 59 U.S.L.W. at 4690 (emphasis supplied).

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[1] In ruling for the Union, the Seventh Circuit relied substantially on its earlier decision in *Short v. Belleville Shoe*, 908 F.2d 1385 (7th Cir. 1990), *cert. denied*, 59 U.S.L.W. 3865 (U.S. June 28, 1991) (No. 90-526), in which the court had held that a federal limitations period applied to suits arising under section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. In *Gilbertson*, this Court specifically noted its agreement with the Seventh Circuit's decision in *Belleville Shoe*. 59 U.S.L.W. at 4691.

[2] Plaintiffs' petition for certiorari does not discuss this Court's decision in *Gilbertson*.

"The analytical framework [adopted in *Gilbertson*] makes consideration of state law alternatives unnecessary where Congress has provided an express limitations period for correlative remedies within the same enactment." *Gilbertson*, 59 U.S.L.W. at 4691. Here, Plaintiffs' implied cause of action under Section 301 of the Labor Management Relations Act of 1947 (which amended the National Labor Relations Act of 1935) is certainly "correlative," if not identical to, an unfair labor practice charge under Section 8(b)(1)(A) of the National Labor Relations Act.[3] As this Court noted in *DelCostello*:

> In this case, however, we have available a federal statute of limitations actually designed to accommodate a balance of interests very similar to that at stake here—*a statute that is, in fact, an analogy to the present lawsuit more apt than any of the suggested state law parallels. We refer to Section 10(b)* of the National Labor Relations Act. . . .
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> The NLRB has consistently held that all breaches of a union's duty of fair representation are in fact unfair labor practices [citations omitted]. We have twice declined to decide the correctness of the Board's position, and we need not address that question today. Even if not all breaches of the duty are unfair labor practices, however, the family resemblance is undeniable, and indeed there is substantial overlap.

462 U.S. at 169-170 (emphasis supplied).

2. Even before this Court's recent decision in *Gilbertson*, the lower courts had virtually uniformly[4] concluded

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[3] The court of appeals noted that Plaintiffs here had filed a charge under Section 8(b)(1)(A) of the National Labor Relations Act which raised claims identical to those in this law suit: "[a]lthough the failed unfair labor practice charge was dressed up for purposes of the federal suit, the conduct complained of was the same." Pet. App. A7. Plaintiffs filed this suit more than a year and a half after the National Labor Relations Board dismissed their charge. *Id.*

[4] In *Brenner v. Local 514, Carpenters*, 927 F.2d 1283 (3d Cir. 1991), for reasons similar to those of the district court in this case,

that *DelCostello* should apply to non-hybrid duty of fair representation claims. Thus, for example, in *Erkins v. United Steelworkers*, 723 F.2d 837 (11th Cir. 1984), *cert. denied*, 467 U.S. 1243 (1984), the Eleventh Circuit held that the Section 10(b) limitations period governed a union member's class action alleging that a union breached its duty of fair representation when its officers committed various acts of misconduct during an extended strike against their employer. Similarly, in *Richardson v. United Steelworkers*, 864 F.2d 1162 (5th Cir. 1989), *cert. denied*, 58 U.S.L.W. 3013 (U.S. May 21, 1990) (No. 88-2009), the Fifth Circuit held that the Section 10(b) limitations period applies to a suit against the union alone for allegedly breaching the union's duty of fair representation by failing to advise striking employees of the employer's right to permanently replace them. *See also Coyle v. BRAC*, 838 F.2d 1404 (5th Cir. 1988) (applying Section 10(b) limitations period to a railroad employee's action against his union alone alleging that the union violated both the Railway Labor Act and the shop agreement by causing him to be discharged for non-payment of dues pursuant to the shop agreement); *Degan v. Ford Motor Co.*, 869 F.2d 889 (5th Cir. 1989) (citing *Richardson* and holding that the six month limitations period set forth in Section 10(b) applied to an employee's claim for breach of the duty of fair representation against his union for having irresponsibly informed him that he would receive early retire-

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the United States Court of Appeals for the Third Circuit concluded that a state limitations period controlled a duty of fair representation suit which alleged that a union had engaged in discriminatory hiring hall practices. The plaintiffs in that suit contended that either Pennsylvania's two year limitations period for fraud and other personal injury actions or its four year limitations period for most breach of contract actions applied to their claim, and the court of appeals remanded the case for a determination of which state limitations period should apply. The Union knows of no other case in which a federal court has refused to apply *DelCostello* to a duty of fair representation claim, and, presumably, the Third Circuit will overrule its decision in *Brenner* in light of *Gilbertson*.

ment benefits if he took separation pay); and *Eatz v. IBEW DME Unit Local 3*, 794 F.2d 29 (2d Cir. 1986) (applying *DelCostello* to an action against a union alone under Section 301 which alleged that the union, in concert with the employer, had unfairly discriminated against the plaintiff employees during the negotiation and administration of several collective bargaining agreements).

The law being essentially settled, with any ambiguity now resolved by this Court's decision in *Gilbertson*, the issue presented in this case does not merit review by this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be denied.

Respectfully submitted,

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